The Solicitors' Journal

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CURRENT TOPICS

Requisitioned Properties

THE interim report of the working committee on requisitioned properties in use for housing, which was published on 4th October, recommended that those local authorities with one family or less per thousand of their population housed in requisitioned premises should release all such properties by 10th December, 1953. For those authorities having between one and two families per thousand so housed, the date should be 10th December, 1954. The MINISTER OF HOUSING AND LOCAL GOVERNMENT, in circular 73/52, issued on 6th October, expressed the hope that authorities will take immediate steps to carry out the recommendations, and he has asked all local authorities in England and Wales to inform him by the end of the year what action they have taken or are taking to comply with the recommendations in the report. The report stated that in the financial year 1951–52 the Exchequer was called upon to bear a net charge of £6,900,312 in respect of emergency housing. This charge was in respect of 131,964 families housed in 86,136 requisitioned properties, and a further 31,169 families occupying emergency accommodation in 1,385 ex-service camps. During the preceding twelve months, just under 4,000 requisitioned properties in use for housing had been released and about 5,600 families had occupied these properties.

Ways and Means

THE committee suggested that authorities should achieve the desired result of releasing properties before 10th December, 1953, by (i) reserving for the permanent resettlement of licensee families a proportion of the lettings becoming available to them from time to time; (ii) helping families to find alternative accommodation, e.g., by putting them in touch with privately owned vacant accommodation, or by the issue of building licences, or by loans under the Small Dwellings Acquisition Acts or the Housing Acts; (iii) in appropriate cases acquiring some of the properties at present held on requisition; (iv) inducing the owners of requisitioned properties to accept the licensees as tenants; (v) releasing any requisitioned property which has been purchased by the licensee; and (vi) releasing any requisitioned property vacated by licensees or transferring to it a family from another requisitioned dwelling where there is a stronger case for release. They urged that it is important that the properties which for one reason or another impose the heaviest burden on the Exchequer should be given the highest priority of release, the second priority being accorded to the owner-occupier who is suffering hardship. In accordance with the report, circular 73/52 asks local authorities to review at frequent intervals the charges made to licensees.

Solicitors' Earnings

UNDER the title "The Solicitor's Earnings," an interesting article in the *Financial Times* of 4th October contrasts the general rise of 35 per cent. in professional earnings (according to the Blue Book on National Income and Expenditure) between 1946 and 1951, and the rise of 57 per cent. and 72 per cent. in the same period in gross wages and salaries and in companies'

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trading profits respectively, with the peculiar position of solicitors with regard to their remuneration. The never sufficiently well-known fact that solicitors' remuneration for non-contentious business is only 50 per cent. above the 1883 level, 12½ per cent. in 1944 being the last increase, is duly noted. Also noted as regards London is the increase of 30·5 per cent. in office rents over the 1938 figure—with worse to come when leases expire—the increase of 54·8 per cent. in staff salaries, and of 41·7 per cent. in overheads like stationery, stamps, office equipment, etc. The number of solicitors in private practice has decreased considerably since before the war. The capital cost of becoming a solicitor is still high, the article states, and yet the newly admitted solicitor can only expect an annual income of £500 in London and rather less in the country. Inland Revenue figures show that nearly one-third of solicitors in partnership in 1947–48 and 1948–49 had incomes of less than £1,000. Adding one-man practitioners and salaried solicitors the percentage is nearer 40 per cent. Over this figure, approximately 30 per cent. earn between £1,000 and £2,000 a year. The article further points to the decline in conveyancing since 1949, the lack of profit in small conveyancing matters, the undue hardship of the maximum payment of £9 under the Poor Prisoners Defence Act, notwithstanding the length of a trial, and the reduction to 85 per cent. of scale costs in legal aid cases.

Applications for Leave to Appeal in Criminal Cases

In the Court of Criminal Appeal on the 6th October, the Lord Chief Justice stated that the judges of the court had decided on a change of procedure. When leave to appeal was refused, the only person interested was the applicant, who was not present, and the court had determined in future to approximate their practice to the civil Court of Appeal, the Appeals Committee of the House of Lords and the Judicial Committee of the Privy Council, which latter body heard many applications in criminal cases. Neither the Court of Appeal, the House of Lords, nor the Judicial Committee of the Privy Council said more than that an application was refused. Occasionally, if a case had not been argued, a judge might let fall a statement which was not strictly accurate in law, and therefore the court would in future only say that an application was granted or refused, unless there was some particular point in the case to which it was desired to draw attention. In capital cases, applications would be listed and treated as appeals.

Malicious Damage to Grass

Some confusion has been caused by a report in the national Press of "thirty-three young people from Sheffield and Barnsley," possibly a party of ramblers, being fined five shillings each by Pontefract magistrates for sitting in a field. The cause, we think, lies with the police superintendent who is reported as saying that there had been "some difficulty" in similar cases in the past because trespass unaccompanied by damage was not actionable in courts of summary jurisdiction. The report would lead one to suppose that this "difficulty" had now been overcome and that trespass had become "actionable" in magistrates' courts because, to quote a botanist who gave evidence, "the growth of grass could be retarded by pressing down the soil around it, by damaging tiny cells or causing 'bleeding' by bruising the surface." The owner of the grass put the damage at sixpence a person, but the magistrates' assessment was one penny per person. In fact, of course, trespass is a civil wrong and no amount of damage would make it "actionable" in a criminal court. The charge must, presumably, have been one of malicious damage. Earlier authorities, the most recent being 1898, seem to suggest that the damage to grass must be wilful and malicious and must be "appreciable." In *Eley* v. *Lytle* (1885), 50 J.P. 308, it was held that the Malicious Damage Act had no application to "inappreciable" damage done by trespassers to grass, though the Queen's Bench Division held in *Gayford* v. *Chouler* [1898] 1 Q.B. 316 that damage to grass estimated at sixpence was punishable under the Act where the trespass was wilful and malicious and followed a request not to trespass.

Accountants and Lawyers

An article by Mr. T. B. Robson, M.B.E., F.C.A., in the *Accountant* of 11th October deals, among other matters, with the relations between the accountancy and the legal professions. He expressed the view that there is little scope for overlapping of the activities of the two professions. There are some respects in which the same kind of work is undertaken by both, for instance, advising on taxing statutes, or acting as executors and trustees. There are, Mr. Robson stated, a few cases in small provincial towns where accountants are dissatisfied because solicitors undertake taxation matters for their clients, including even the preparation of accounts. Conversely, he wrote, there is some dissatisfaction among provincial solicitors because of the activities of accountants in relation to company formation. With the aid of registration agents, accountants can sometimes do the whole of the work in forming a company. The Council of the Institute has issued a statement to members for their guidance on how far they should go in this matter of company formation, but even within the terms of that guidance it is still possible for accountants to do a great deal of the work involved. Not unnaturally provincial solicitors are inclined to feel that this kind of work should be in their hands. Mr. Robson concluded that, in general, accountants and lawyers do not tread on each other's toes.

A Miscarriage of Justice

The gross miscarriage of justice in the well-known case of *Bardell* v. *Pickwick* has at last been righted, a little less fictitiously than it was perpetrated, before Mr. Justice Slade, in an appeal somewhat irregularly, but we trust not invalidly, heard in Middle Temple Hall on 6th October. Eminent counsel, owing to the lapse of time and other circumstances, did not include Mr. Serjeant Buzfuz, Mr. Skimpin, Mr. Serjeant Snubbin or Mr. Phunky, but Sir Arthur Comyns Carr, Q.C., and Mr. George Edinger for Mr. Pickwick, and Mr. J. E. S. Simon, Q.C., and Lord Dunboyne for Mrs. Bardell, brilliantly took their place. Mr. Justice Slade extended the time for the appeal, which was 120 years late, applying the maxim *de minimis non curat lex*. He refused to allow Mr. Pickwick to be called, regarding it as a suspicious circumstance that counsel on both sides supported an application to this effect. Among ingenious submissions on both sides, Lord Dunboyne's argument that Mr. Pickwick and his witnesses should be presumed dead was outstanding. Mr. Justice Slade ruled against the argument that a Court of Appeal consisting of one judge had no jurisdiction to hear the appeal and held that there should be a new trial because the judge was asleep during the proceedings; and a mass of inadmissible evidence was admitted. He hoped the new trial would take place at the diamond jubilee of the Dickens Fellowship ten years hence. The hearing of the appeal coincided with the fiftieth birthday of the Dickens Fellowship.

MARRIAGE SETTLEMENTS: VARIATION OF POWERS OF APPOINTMENT

THE power of the court to order a variation of settlements in connection with matrimonial causes is now to be found in ss. 24 and 25 of the Matrimonial Causes Act, 1950, which re-enact former statutory provisions dealing with the subject. A general discussion of this subject would cover a wide range and we propose, therefore, to confine our attention to one aspect of the matter, namely, the variation of powers of appointment contained in marriage settlements.

The immediate purpose of the statutory powers of the court to vary marriage settlements is to protect the interests of parents and children wronged by matrimonial offences, and not to create interests in favour of wrongdoers or of third parties. The court will not, therefore, against the wishes of one or more of the parties interested under a marriage settlement, partition the settled funds in order to enable the guilty wife, who has married the co-respondent in the suit, to make a settlement for the benefit of the children of the marriage. In *Noel* v. *Noel* (1885), 10 P.D. 179, the marriage of the parties had been dissolved by reason of the adultery of the wife. There were two children of the marriage living with the petitioner. By the marriage settlements the husband's property, which consisted of £10,000 invested on mortgage and reversionary interests in land yielding about £200 a year, was settled in trust for the husband for life, then for the respondent for life, and afterwards for the children of the marriage as the husband and wife, or the survivor, might appoint, and in default for the children equally, and in default of children for the petitioner or his representatives. The property of the respondent, after a first life interest to her, was settled upon similar trusts to those of the husband's property, except that the ultimate trusts were as she should appoint, and in default for her next of kin; and it was also provided that if she should survive her husband she should be at liberty, in certain events, to appoint a portion of the income in favour of any husband she might marry after the death of the petitioner, and a certain proportion of the capital, for the benefit of such marriage. The wife's property in settlement consisted of an annuity of £400 payable by her father, a reversionary interest in land yielding about £400 a year, and several sums of money amounting to £26,000. The incomes of the parties at the time amounted to about £400 a year each.

On a petition for variation of settlements, Hannen, P., held that the interest of the wife in the property which the husband brought into settlement must be extinguished as though she were dead. As to what should be done with the income which the wife enjoyed it was ordered that £400 a year should be paid over to the husband for the use of himself and his children. With regard to the wife's reversionary interest, on the principle that "when a woman by her own fault has broken up a family of which she was a part, the court must endeavour to put the husband and the children, as far as money goes, in the same position as they would have been if she had not broken it up," it was ordered that half of that income when it fell in must be paid to the husband. The husband and wife had a joint power of appointment over both settlements among the children; the wife's power of appointment was extinguished because as she would no longer have charge of the children she would not have the same opportunity of exercising a judgment as to the propriety of making any particular disposition of her property among them. The power of appointment in favour of her husband in the event of her surviving the petitioner, and contracting a second marriage, was extinguished in so far as it gave a power of appointment in favour of any husband she might marry during the petitioner's life, but the existence of that power was not disturbed in favour of any husband whom the respondent might marry after the death of the petitioner. As the learned President pointed out, the petitioner and his children would not be in any way damnified if the respondent's power of appointment was limited to the case of the husband taken after the death of the petitioner.

In the same way, as regards the children of a second marriage, supposing that the respondent married during the lifetime of the petitioner, the respondent must have the power of appointing in favour of children born after the death of the petitioner. In *La Terriere* v. *La Terriere and Grey* (1921), 37 T.L.R. 97, 671, the respondent, a wife whose marriage had been dissolved because of her adultery with the co-respondent, had brought into settlement on her marriage with the petitioner the sum of £30,000. She had power under the settlements, if she survived the petitioner and re-married, to appoint two-thirds of her funds for the benefit of the husband and children of such future marriage; and she was also empowered to withdraw from settlement during her lifetime, or to dispose of by will, the sum of £10,000. There was one child of the respondent's marriage with the petitioner. The respondent had married the co-respondent. Upon a petition for variation of settlements, Lord Merrivale, P., refused to sanction an arrangement acquiesced in by the petitioner, by which the respondent was to be permitted to withdraw a portion of her fund for re-settlement on the co-respondent and on her children, if any, by him; ordered provision to be made, out of the income of the respondent's fund, for the maintenance of the child of the first marriage; directed that the respondent's power of appointment in favour of a future husband and children should be limited so as to apply only to a husband married after the death of the petitioner and to the children of such a marriage; and extinguished the respondent's power to withdraw £10,000 from settlement during her lifetime, but permitted her to retain the power to dispose of that sum by will. On the last point the learned President pointed out that the power to withdraw and the power to bequeath had a different operation in relation to the interests of the infant, and while he must extinguish the power to withdraw part of the funds during the life of the infant, he would leave the power to bequeath as it stood.

As a further example of limiting a wife's power of appointment in favour of a future husband and children to a husband married after the death of the petitioner and to the children of such a marriage, we may refer to *Williams* v. *Williams and Kilburn* [1920] P. 69, where the husband obtained a decree of dissolution of marriage on the ground of the wife's adultery with the co-respondent and there were two children of the marriage, boys of eight and ten respectively, the custody of whom was given to the father. The wife had married the co-respondent after the decree absolute. By an ante-nuptial settlement, funds brought in by the husband and wife were settled in trust in each case for the party bringing in the fund for life with remainder to the other party for life, and subject thereto in each case for the children of the marriage in such shares as the husband and wife jointly or the survivor should appoint and in default of appointment for the children of the marriage equally. And the settlement contained a power for the survivor of the husband or wife upon or in

contemplation of a subsequent marriage to withdraw from the settlement a certain proportion of the funds brought into the first settlement and settle the same upon such trusts as should be declared by the appointment to a second wife or husband and the children or issue of a second marriage. On the husband's petition to vary the settlements, Duke, P., extinguished the rights, powers and interests of the respondent in or over the husband's trust funds; extinguished the respondent's power of appointment of her trust funds amongst the children or remoter issue of the first marriage; and extinguished the respondent's power of appointing interests to the husband and children of any subsequent marriage except a marriage contracted after the death of the petitioner.

It may happen that an innocent spouse may wish to appoint to children of a later marriage to the detriment of existing children of the dissolved marriage. Thus, in *Webster* v. *Webster and Williamson* [1926] P. 198 the parties were married in 1917, and the husband obtained a decree of divorce in January, 1926, on the ground of his wife's adultery. There were two children of the marriage born in 1918 and 1922 respectively. By a settlement executed before the marriage, property brought into settlement by the husband was settled on him for life, with an ultimate remainder to the children of the intended marriage as the husband and wife jointly, or the survivor, should appoint. The husband was given a power to draw out of the settlement a sum of £2,000, but there was no provision for any settlement by him in the event of a second marriage. The wife brought no property into settlement. The husband's petition to vary the settlement not merely asked to extinguish the wife's interests as if she were dead but also applied to settle a life interest in three-fourths of the settled funds upon a future wife and to appoint to children of a future marriage. Hill, J., confirmed the registrar's report that the settlement should be varied only by extinguishing the rights, powers and interests of the wife as if she were dead, and rejected the remainder of the husband's application. As the learned judge pointed out, the husband was asking that the variation should go beyond extinguishing the wife's interest in the settlement and provide for something not contemplated by the settlement —namely, a possible future marriage of the husband, who wanted a limited power of appointment in favour of a future wife and children of a future marriage. The learned judge was very careful not to rule that the court had no power to create a new power which was not contemplated by the settlement. He confined himself to holding that in this case he would not create any such new power.

It will be noted in *Webster* v. *Webster and Williamson*, *supra*, that the alteration to the settlement proposed by the petitioner would have meant that all money was lost to the children of the dissolved marriage. But if the child of a first marriage may gain advantages concurrently with the creation of a fresh power of appointment enabling children of a second marriage to share a settled fund with it, the court may create that power, although it is not originally existent in the settlement and although its creation may eventually involve some pecuniary sacrifice on the part of the child of the first marriage. Thus, in *Scollick* v. *Scollick* [1927] P. 205 the wife obtained a decree of dissolution of marriage with her husband. By a marriage settlement executed on the marriage of the parties the trust fund, which was solely contributed by the wife, was settled upon trust to pay the income to her for life without power of anticipation and after her death to the husband for his life (subject to certain limitations) and after the death of the survivor in trust as to the corpus of the fund for the children or remoter issue of the intended marriage, as the husband and wife jointly, or the survivor of them, should appoint, and in default of appointment on certain conditions set out in the settlement. And the settlement further provided that in the event of there being no child of the intended marriage attaining twenty-one, or in the case of a daughter marrying under that age, the life interest of the husband should cease and the trust fund should be held as to one-third for the husband absolutely and as to the residue in trust for the wife absolutely and in the event of her predeceasing the husband in trust for the persons entitled in distribution had the wife died intestate and a spinster. And the settlement contained a power to the husband, if surviving, to appoint new trustees. There was one child of the marriage, a daughter, Audrey Vincent Scollick, born on 20th May, 1918. The trust fund was not yet in possession. It was estimated that the capital value of it would amount to about £11,000, producing an annual income of £500. A month after the decree was made absolute the petitioner married a second husband. Upon the wife's petition to vary the settlement, the first husband did not appear, and the second husband of the petitioner filed an affidavit undertaking that if the petitioner was allowed to appoint out of her trust fund to any children born of his marriage with her, he would provide out of his own resources for Audrey Vincent an education befitting her station in life, until the age of sixteen, if he should so long live and until the death of the survivor of the parents of the petitioner. It was further reported that the petitioner had no means of her own, that the respondent was not in a position to contribute to the maintenance and education of Audrey Vincent and that the second husband of the petitioner was at present paying the school fees of the child. In addition to extinguishing the rights and powers of the respondent under the settlement as if he had died in the lifetime of the petitioner, Hill, J., further varied the settlement by inserting a power to appoint to children of a subsequent marriage. The effect of this was that the mother (i.e., the petitioner) was given power to appoint a moiety of the fund in favour of her children by her second marriage, and further changes to give effect to that were made, including the conversion of the interest of the child of the first marriage into a vested one. It will be observed that in the above case it was in the interests of the child Audrey Vincent that while she was growing up she should be secured with proper maintenance and good education, even at the sacrifice of some portion of the fund, which might in fact not actually come into her possession for many years.

Where a marriage settlement contains a power to appoint in favour of a second spouse and the children of a second marriage, the exercise of this power may be accelerated. Thus, in *Whitton* v. *Whitton* [1901] P. 348 the wife petitioner, who obtained a decree against her husband on the grounds of cruelty and adultery, was given the custody of the two children of the marriage, a girl aged five and a boy aged three years. The marriage settlement provided in effect that a portion of the trust fund would ultimately enure for the benefit of the children after the death of the parents, and it also gave the petitioner power to appoint, after the death of the respondent, in favour of a second husband and the children of a second marriage. In addition to extinguishing the respondent's interest in the settlement as if he were dead, Jeune, P., ordered that the petitioner should be allowed to appoint a specified sum in favour of any future husband and children of a second marriage during the respondent's lifetime. The effect of striking out the husband's life interest in the fund was that the children accordingly got a very substantial benefit in the shape of an acceleration of their interests. As a *quid pro quo* for that advantage, the

children conceded that their mother, the petitioner, should be allowed to appoint a specified sum upon a future marriage. As the learned President said: "It would be hard that a wife who is freed by the misconduct of her husband should not be able to appoint anything at all in favour of a second husband; and if, *without substantial injury* to the interests of the children of the first marriage, such an arrangement can be made, I think it is desirable and is in accordance with the spirit of the Act of Parliament."

Likewise, the husband, if the innocent party, may be allowed to exercise a power of appointment in favour of a second marriage during the lifetime of the respondent wife. In *Hodgson Roberts* v. *Hodgson Roberts and Whitaker* [1906] P. 142 the marriage was dissolved by reason of the respondent wife's adultery. There was one child of the marriage. The petitioner (husband), who was now forty years of age, had settled £40,000, and the respondent (wife), who was now thirty-five years of age, had settled £10,000. Outside the settlement the petitioner was entitled to other property, including a reversionary interest, amounting to between £20,000 and £30,000. The settlement gave the petitioner power, if he should survive the respondent, to appoint (in the event of there being only one child) two-thirds of the fund settled by him in favour of a future wife and the issue of a future marriage. In addition to extinguishing the wife's interest in the husband's settled fund, Barnes, P., ordered that the husband should be allowed to exercise his power of appointment in favour of a future wife and the issue of a future marriage during the lifetime of the respondent to a partial extent, namely, to the extent of one-third only of his settled fund.

In *Alston* v. *Alston* [1929] P. 311 the wife had obtained a decree of dissolution on the ground of her husband's adultery. There were two children of the marriage, both daughters, then aged respectively fifteen and thirteen. The petitioning wife was forty-two years of age and the respondent husband forty-one. The income of the wife from her settlement was £500 per annum, and she had a reversion to a capital sum of about £40,000 on the death of her mother, aged seventy. The settled land of the respondent amounted to about £80,000. Both parties had power to resettle trust funds in the event of a second marriage. Upon a petition to vary the settlements, Bateson, J., agreed to the respondent's proposal that out of the respondent's fund of £80,000 the sum of £40,000 should be appointed to the two children of the dissolved marriage, subject to their parent's life interest, and that the respondent should have power to settle the remaining moiety to any after-taken spouse who might survive him and for the capital of that moiety in favour of any of his children or remoter issue as he might think fit. The effect of this arrangement was to accelerate the power to resettle the trust funds on a subsequent marriage in the interests of the two children of the dissolved marriage, who consequently got a vested interest in £20,000 each.

It is contrary to usual practice that an innocent spouse should suffer a curtailment of powers given by the settlement. In *Colclough* v. *Colclough and Fisher* [1933] P. 143 the marriage was dissolved on account of the respondent wife's adultery. The husband was aged twenty-eight and the wife twenty-two. There was one child of the marriage, a girl. By a marriage settlement the petitioner husband brought into settlement £30,000, and the respondent was receiving from her fund under the settlement an income of £930, subject to an annual charge of £287, with a prospect of considerable reversionary income. Both spouses had power to withdraw funds from settlement and resettle them on a second marriage in the lifetime of the other spouse. After extinguishing the interest of the wife in the husband's fund, Langton, J., ordered that the wife's power to resettle should be limited to one-third of her fund but refused to limit the husband's power to resettle. The learned judge pointed out that the original settlement reserved a certain power to the innocent petitioner and that it was not necessary in order to secure the well-being of the child that there should be any interference with the petitioner's powers. The child's position was sufficiently secured having regard to the ages of the parties, to her position in life, and to the bulk of the fund that existed. In *Maxwell* v. *Maxwell and Rognor* [1951] P. 212 the husband was granted a decree of dissolution of marriage on the ground of his wife's adultery. There were two children of the marriage, then nine years and eight years of age. It was provided by the marriage settlement, to which both parties had contributed substantial sums, that the survivor of the spouses might appoint from his or her fund to an after-taken husband or wife, or the issue of a subsequent marriage, a proportion of his or her fund subject to a maximum of one-third of that fund. In addition to extinguishing the wife's interest in the husband's fund, Wallington, J., ordered that the wife should settle £5,000 upon herself for life and after her death for the children of the marriage.

In considering whether to vary a marriage settlement in favour of children by a future marriage, a factor to be taken into consideration is the effect of the variation upon an existing satisfactory relationship between a spouse and a child of the first marriage. Thus, in *Garforth-Bles* v. *Garforth-Bles* [1951] P. 218 the marriage was dissolved on the ground of the husband's adultery. There was one child of the marriage. By a marriage settlement both parties brought in substantial funds, the husband's share being twice that of the wife. The settlement provided that the income of the wife's fund was to go to the wife for her life, then to the husband for his life, and thereafter to the children or remoter issue of the marriage, both parties jointly having a power of appointment. The husband's fund consisted of certain reversions of which the income, when they fell in, was to go to the husband for his life, and then to the wife for her life. Thereafter the fund was to go to the children or remoter issue. There was a similar power of appointment. The husband was forty years of age, and had already consented to a generous order for the maintenance of the only child of the marriage. Pearce, J., allowed the husband to withdraw two-fifths of his fund from the settlement and to appoint that portion to an after-taken wife and the issue of any future marriage, subject to the husband appointing the remaining three-fifths of his fund to the child of the dissolved marriage. The learned judge pointed out that if he were to refuse the husband's request to appoint some portion of his fund in favour of a second marriage and to devote exclusively to the child all the money that came from the husband, allowing none of it to go to any future wife or child of his, it might give the husband a feeling of injustice and impair the satisfactory relationship between father and child. There might be cases where financial stringency might compel one to reject such a request, but this was not such a case.

M.

Mr. N. R. Fenton, solicitor, of Blackpool, left £34,144 (£31,438 net).

Mr. Godfrey Heathcote, retired solicitor, of Cheltenham, formerly of Kingswear, left £35,795 (£35,677 net).

Mr. E. Heys-Jones, retired solicitor, of Goring-by-Sea, left £54,850 (£54,685 net).

Mr. W. H. Satterthwaite, solicitor, of Lancaster, left £41,773 (£41,283 net).

WIFE AS HUSBAND'S AGENT: EFFECT OF HER MEANS

In *Biberfeld* v. *Berens* [1952] 2 T.L.R. 39 the Court of Appeal were concerned with the right of a wife to pledge her husband's credit as an agent of necessity and with the effect upon it of the possession by her of means of her own, and it was there held that in such a case in considering whether a wife is acting as such agent of necessity regard must be had to her means. Denning, L.J., in the course of his judgment, however, had occasion to refer to the right of a wife to pledge her husband's credit for necessaries when they were living together, and in so doing he questioned the existence of such a right in the case where the wife had means of her own. He says: "I do not accept the proposition that when husband and wife are living together the means of the wife are irrelevant. I know that in the case of *Callot* v. *Nash* ((1923), 39 T.L.R. 292), McCardie, J., said (39 T.L.R. 293): 'The law draws no distinction between a wife with a large income and a wife with no income at all. . . . The wife may accumulate all her income and throw the whole burden of her keep on her husband.' I do not think that is right. At the present day, when a wife is in nearly all respects equal to her husband, she has to bear the responsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool just as his do. When they are living together, she can, of course, pledge his credit for the household necessaries, but I doubt whether she can pledge his credit for her own private necessaries, like dresses and hats, when she has ample means with which to buy them. Whatever may be the true position when they are living together, nevertheless the law when they are separate is quite clear. It is this: if a wife is deserted by her husband, or he treats her with such cruelty that she is forced to leave him, she is entitled at common law to pledge his credit for necessaries, subject, however, to this qualification, that if she has earning power of her own, or money of her own, which she could reasonably be expected to use to pay for the necessaries, then she has no authority to pledge his credit for them."

In his judgment, Hodson, L.J., after referring to the proposition there contended for by counsel for the wife, that a wife may, if she chooses, deliberately abstain from using her own means and rely on her husband's duty to maintain her, stated that it was not, however, necessary to decide that problem in the case of a husband and wife living under the same roof.

There is, therefore, on the face of this judgment a contrast between the right of a wife with means of her own to pledge her husband's credit for necessaries when the husband and wife are living together, and the right of a wife with means of her own to pledge her husband's credit for necessaries when the husband and wife are living apart through the husband's fault. It may, however, be observed that in connection with such a contrast Singleton, L.J., gave an answer to the question which had been asked during the course of argument—Why should the wife be worse off after she is turned out of the family home than she was before?—by saying that he thought the answer probably was that in the eyes of the law she was not, and that a previous judgment in the United States to which he had referred and upon which he relied in coming to the conclusion which he had on the facts then before him made clear the true position.

It is, therefore, in an attempt to see what is the position on the authorities as they now stand in connection with the right of a wife to pledge her husband's credit as regards the means of the wife where husband and wife are living together that these authorities will be examined. In order, however, to see the matter in its proper perspective, it may be helpful to examine the difference between the liability of a husband in respect of necessaries supplied to his wife while they are living apart through the husband's misconduct, when she then becomes an agent of necessity, and his liability in respect of necessaries supplied to her while they are living together, since it is conceived that this distinction is a crucial one in determining the question under discussion.

1. *Necessaries supplied while living apart through the husband's misconduct*

As regards the basis of liability as an agent of necessity, this is put in this way by Alderson, B., in *Read* v. *Legard* (1851), 6 Ex. 636, at p. 642: "By the marriage contract entered into when the defendant was sane, the parties contracted a relation which gave the wife certain rights, which the law recognises. It is only necessary for us to say that one of them is, that the wife is entitled to be supported, according to the estate and condition of her husband. If she is compelled by his misconduct to procure the necessary articles for herself, as, for instance, if he drives her from his house or brings improper persons into it, so that no respectable woman could live there, according to the decided cases he gives her authority to pledge his credit for her necessary maintenance elsewhere; which means that the law gives that authority by force of the relation of husband and wife. So if a husband omits to furnish his wife with necessaries while living with him, she may procure them elsewhere, otherwise she would perish." Again, Erle, C.J., says in *Harrison* v. *Grady* (1865), 13 L.T. 369: "The authority of the wife may be a *presumptio juris* that is incapable of being rebutted by evidence; as where a wife is turned out of her home without the means of obtaining necessaries, then a presumption of law arises that she was turned out with the authority of her husband to pledge his credit for necessaries; . . ." and in more recent times in *Iles* v. *Iles* (1931), 145 L.T. 71, Lord Merrivale, P., in expressing the basis of this right says: ". . . the right of a married woman to maintenance is independent of any specific contract and antecedent to any statutory provision . . ." and Du Parcq, L.J., in giving the judgment of the Court of Appeal in *Sandilands* v. *Carus* [1945] 1 K.B. 270 referred to this right as "a common-law right which has for centuries been an incident of the status of marriage."

Since therefore this right is an incident of the status of marriage, it can only arise, apart from any question of liability of the husband by reason of ostensible authority, in the case where the man and woman concerned are in law husband and wife (see *Munro* v. *De Chemant* (1815), 4 Camp. 215, as explained in *Ryan* v. *Sams* (1848), 12 Q.B. 460). And where the relationship of husband and wife does exist in law, this right of the wife as an agent of necessity remains unaffected by a prohibition to her by the husband not to pledge his credit, or even by a particular prohibition by him to the person who supplied her with the necessaries not to trust her (see *Bolton* v. *Prentice* (1744), 2 Str. 1214). In that case judgment had been given against a husband for the plaintiff, who had supplied the wife with necessaries where the husband after cohabiting with his wife together for a year had without any cause appearing left her, locked up her clothes, and upon her finding him out refused to admit her,

and struck her, and declared he would not maintain her, or pay anybody that did. In refusing a motion for a new trial, the court held that the verdict on this part of the case was right, since the causeless turning the wife away destitute afterwards gave her the general credit again; that if a husband should be allowed, under the motion of a particular prohibition, to destroy her obtaining credit in one place, he might in the same manner prevent it with all people she was acquainted with; and that he appeared to be a wrongdoer, and therefore had no right to prohibit anybody. Again, in *Harris* v. *Morris* (1801), 4 Esp. 41, Lord Kenyon, C.J., says this of a defence of prohibition of credit by a husband who had taken his wife back, but had afterwards turned her out-of-doors: "The next defence is: That he advertised her in the newspaper, and forbade persons to trust her; that cannot avail him; for if he put her out-of-doors, though he advertised her, and cautioned all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessaries furnished to her; for the law has said that where a man turns his wife out-of-doors he sends her with her credit for her reasonable expenses."

This right, however, is lost where the wife commits adultery, even though the husband had turned her out-of-doors (*Govier* v. *Hancock* (1796), 6 Term Rep. 603; *Cooper* v. *Lloyd* (1859), 6 C.B. (N.S.) 519). The court in refusing a rule to set aside the verdict for the husband in *Govier* v. *Hancock* said that, though the precise case did not appear to have been controverted before, it was probably because the point had not been doubted; and that it must be governed by the same principle on which it had been determined that the husband is not liable in cases where the wife goes away with an adulterer. And the reason underlying this principle was stated thus by Scrutton, L.J., in *H. S. Wright and Webb* v. *Annandale* [1930] 2 K.B. 8, at p. 14: "As I understand it, the rule is simply a particular instance of the general law of agency, which is that, if an agent has been guilty of an act in breach of the contract of agency and which goes to the root of that contract, the agent can no longer make any claim upon the principal. . . . The common-law rule that, if the wife is unchaste, she ceases to be the agent of necessity for her husband when she is no longer living with him, is simply an instance of the general rule as to misconduct by an agent of such a character as to determine all rights under the contract of agency."

In view, therefore, of the fact that, as the above cases show, the only answer which can be set up in law by a husband to a contract for necessaries made by the wife as an agent of necessity lies in the commission by her of an act of adultery, which determines all her rights under the contract of agency, it is of interest to see upon what grounds it was held in *Biberfeld* v. *Berens* that, in considering whether or not a wife can pledge her husband's credit as an agent of necessity, regard must be had to the wife's means. The reason for this decision is well expressed in the American case of *Litson* v. *Brown* (1866), 26 Harrison Indiana Reports 489, the judgment in which was quoted with approval by Singleton, L.J., in the Court of Appeal in this case, who stated that in his opinion this judgment correctly states the law applicable in this country. In his judgment in the American case Elliot, J., puts it in this way: "If the husband who, in violation of his marital obligations, drives his wife from his home without the means to procure the necessaries of life could also deny the credit to supply them, she would be liable to suffer or perish from want. The law, therefore, from necessity, authorises anyone to supply her necessary wants under such circumstances, and to look to the husband for compensation. But if she has the means of support, while so separated from her husband, come from what source they may, whether furnished by the husband, or arising from her separate estate, no necessity exists that they should be furnished by others, and in such case the husband could only be liable upon an express promise to pay." This judgment therefore shows what is the ground upon which it has been held that the possession by a wife of means of her own takes away her right to pledge her husband's credit as an agent of necessity, namely, that in such a case no necessity exists that she should be furnished by others with necessaries at her husband's expense. As regards this decision, it is submitted with respect that it is both logical and reasonable that the possession by a wife of means of her own should bar her remedy in a case in which the law implies authority on her part to pledge her husband's credit, particularly so when it is an authority which, as has been seen, cannot in law be determined by the husband, not even by a prohibition on his part, and which is only put an end to by the commission of an act on her part, namely, adultery, which, again, is simply a particular instance of the general law of agency.

2. Necessaries supplied while living together

The liability, however, of a husband in respect of necessaries supplied to his wife while they are living together is based upon an entirely different ground, and the authorities show that this liability can be determined by the husband himself, apart from the revocation of her agency by the wife by the commission by her, as has been seen, of an act of adultery. (This is, of course, subject to the limitation that, if while they are living together the husband leaves the wife unprovided for, she then becomes an agent of necessity, with the resultant liability of the husband being as stated under heading 1 above.)

As regards the basis of the husband's liability in the case which is now under discussion, the contrast between his liability in the one case and in the other is well expressed by Erle, C.J., in the above case of *Harrison* v. *Grady*. There, after dealing in the passage already quoted with the husband's liability where he turns his wife out-of-doors, he goes on to consider the husband's liability where his wife is living with him, saying: "While the wife is living with her husband there is a presumption of fact that what she ordered she had authority to order. . . . It is a presumption from cohabitation that the wife is the agent of her husband"; and, as was said by McCardie, J., in *Miss Gray, Ltd.* v. *Cathcart* (1922), 38 T.L.R. 562: "In the words 'presumption of fact' lay the root of the matter." Thus, there is no mandate in law from the mere fact of marriage, but the law implies a mandate to the wife from the fact not of marriage but of cohabitation, and this is an implication of fact, and not a conclusion of law, and it raises no question of ostensible authority (see *Debenham* v. *Mellon* (1880), 6 App. Cas. 24, *per* Lord Selborne, L.C., at p. 31), and as was said by Lush, J., in *Eastland* v. *Burchell* (1878), 3 Q.B.D. 432, at p. 435: "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority" (this presumption, being one of fact, also arises where a man is cohabiting with a woman as his wife: see *Debenham* v. *Mellon*, *supra*).

This presumption of authority, therefore, being one of fact only, is capable of being rebutted by the husband and the withdrawal by him of his assent to her contract for necessaries may be proved in the following ways. For example, the husband may have prohibited his wife from pledging his credit, and knowledge of this on the part of the

person supplying the goods is immaterial (*Jolly* v. *Rees* (1864), 15 C.B. (N.S.) 628; *Debenham* v. *Mellon* (1880), 5 Q.B.D. 394; affd., *supra*); or by his having given a specific prohibition to the person supplying the goods (*Etherington* v. *Parrot* (1703), 1 Salk. 118); or by his having provided her with an adequate supply of goods (*Morgan* v. *Chetwynd* (1865), 4 F. & F. 451; *Reneaux* v. *Teakle* (1853), 8 Ex. 680); or by his giving her an allowance or means for this purpose, and knowledge of this is also irrelevant (*Remmington* v. *Broadwood* (1902), 18 T.L.R. 270; *Slater* v. *Parker* (1908), 24 T.L.R. 621; *Morel Bros., Ltd.* v. *Westmoreland* (*Earl of*) [1904] A.C. 11).

The question which then arises is, What is the extent of the authority which the law presumes to be thus vested in the wife arising from cohabitation? This is put in this way by Willes, J., in *Phillipson* v. *Hayter* (1870), L.R. 6 C.P. 38: "What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife." And although it may be the law that as regards household necessaries there is no presumption of fact arising from cohabitation where a wife is not managing the household in the ordinary way (see *per* Lord Selborne in *Debenham* v. *Mellon*, *supra*), there is a presumption of fact arising from cohabitation that a wife has her husband's authority to contract for necessary clothing for her own use. Thus, in *Shoolbred* v. *Baker* (1867), 16 L.T. 359, Willes, J., says: "The wife, if not restrained by the husband, would be the person to give orders for the ordinary clothing of the family; and in the absence of express stipulation on the part of the husband, it would be presumed that the wife had authority to order things suitable to the condition in which the husband chose to live" (and see *Paquin, Ltd.* v. *Beauclerk* [1906] A.C. 148, *per* Lord Collins, M.R., at p. 151).

In the light, therefore, of the above statement of the law, what is the effect upon the presumption of fact arising from cohabitation as regards the right of the wife to assume her husband's assent to her contract for necessaries of her being in possession of means of her own? Does it prevent this presumption from arising, or is it a fact which is irrelevant in considering this question? As regards the supply of household necessaries, it is to be observed that Denning, L.J., in his observations on the point, conceded that, even in the case of a wife with means, the presumption would still apply, and the point in issue, therefore, centres on the right of a wife in such a case to pledge her husband's credit for the supply of clothing where she has sufficient means of her own to supply herself with all that she requires.

As far as the authorities go which bear on the question as to the effect of the means of the wife, the first case appears to be that of *Davidson* v. *Wood* (1863), 32 L.J. Ch. 400, in which it was held that certain persons who had lent money to a wife whose husband had become a lunatic were entitled to prove in equity against his estate after his death in respect of the sums so lent. It appeared there that the money had been borrowed by the wife and had been spent by her, partly to provide herself with necessaries, and partly to meet the expenses of the removal of her husband to an asylum in London and of herself to a house in London. There the claim of her creditors was admitted notwithstanding that the wife was possessed of separate property, Wood, V.-C., in his judgment, saying that it was new to him that a married woman living apart from her husband was bound to pledge her separate property for her maintenance without calling upon her husband to contribute towards her support. On appeal his judgment was affirmed, but no opinion was expressed in the judgment upon the effect of certain common-law cases which had been referred to by counsel for the executors.

The reasoning underlying this case was applied by Rowlatt, J., in *Seymour* v. *Kingscote* (1922), 38 T.L.R. 586, where in a claim against a husband for dresses supplied to the wife he held that the mere fact that a wife has an income of her own does not negative her power to pledge her husband's credit for necessaries. In his judgment holding the husband liable, and coming to the conclusion on the evidence that there was no agreement between them that, while the husband was to pay for the household and other necessary expenses, the wife was to pay for her own dresses out of her separate estate, he says this on this part of the case: "No doubt if she had an income of her own it might be arranged between the two that she should apply that income for her own necessaries, or some of them, and not pledge the husband's credit. It may be arranged that she shall do so, because I do not think that the mere fact that she has means of her own negatives her power to pledge the husband's credit as regards some necessaries, at any rate. I think that that appears from the case of *Davidson* v. *Wood* [*supra*], but, as far as I know, there is no principle that, as regards any necessaries—the most personal necessaries like dress—the mere fact that the wife has an income of her own negatives her power to pledge her husband's credit. I may point out that it would be very difficult to apply any such rule, because she might have some means, but not enough. She might have an income which would provide for her boots but not for her dresses, or for her day dresses and not for her evening dresses, and it would be a curious thing if the question arose whether the bootmaker or the dressmaker were to look to the husband to the exclusion of her private estate. Therefore, it seems to me that the question remains simply one of fact (which does not make it easy) whether, in the circumstances of each case, and this case among others, the husband negatived his wife's authority to pledge his credit for necessaries." As regards the question which was posed by Rowlatt, J., but to which he gave no answer, as to what would be the position if, during a course of years, a wife uses her own income exclusively for her own purposes and never calls upon the husband for anything of the sort, and he does not call upon her to contribute at all to the general expenses, it would appear that the same result would follow, and that the *prima facie* presumption of authority would not in such a case be rebutted by the wife's position above. Again, in referring to *Davidson* v. *Wood*, McCardie, J., in *Callot* v. *Nash*, *supra*, made the statements set out above in support of this judgment of Rowlatt, J., which have been referred to by Denning, L.J., at the beginning of this article.

The last case to which reference should be made is the judgment of Lord Collins, M.R., in *Morel Bros., Ltd.* v. *Westmoreland* (*Earl of*), *supra*, in the Court of Appeal [1903] 1 K.B. 64. There it was held that the fact that a husband and wife, each having property, had been living together, and that necessaries had been supplied for the household on the orders of the wife, afforded no evidence of a joint liability on the part of the husband and wife to pay for the necessaries supplied, but that the presumption *prima facie* arose in such a case that there was an actual authority impliedly given to the wife by the husband to pledge his credit for necessaries for the household, which presumption might of course be rebutted.

The Master of the Rolls says on the point of the wife having a separate income: "The fact that the goods were supplied on the order of the wife does not give rise to any inference pointing to a joint liability. If anything, it is rather evidence of a separate liability on the part of the wife. The fact of the wife's having a separate income does not appear to have been known to the plaintiffs, and cannot alter the ordinary presumption which arises where the husband and wife are carrying on a joint marriage." It would appear, however, that, even if this fact had been known to the plaintiffs, it would not have altered the ordinary presumption of authority in the wife. This knowledge might, however, be a factor leading to the inference that credit was given to the wife to the exclusion of the husband, as in the cases of *Bentley* v. *Griffin* (1814), 5 Taunt. 356; *Jewsbury* v. *Newbold* (1857), 26 L.J. Ex. 247; see, for example, *Freestone* v. *Butcher* (1840), 9 Car. & P. 643, where, however, the goods were not necessaries.

In conclusion, it is submitted with all due respect to the observations of the learned lord justice that the principle underlying the above cases should be followed, and that it is both logical and reasonable that the mere fact of the possession of means by the wife should in itself be regarded as irrelevant in considering whether a presumption of authority exists to enable her to contract for necessaries as agent for her husband where they are living together, bearing in mind that this presumption of authority is one of fact only and is capable of being rebutted at any time by an act on the part of the husband, even though this act is unknown to the person supplying the wife with the necessaries.

M. H. L.

A Conveyancer's Diary

CONTRACT FOR SALE OF LAND: PURCHASER'S BANKRUPTCY BEFORE COMPLETION

THE question which arose in *Jennings' Trustee* v. *King* [1952] 2 T.L.R. 469; *ante*, p. 648, was this: is a party to a contract for the sale of land who receives notice of an act of bankruptcy by the other party pending completion of the contract at liberty to put an end to the contract, by accepting the repudiation implicit in the act of bankruptcy, so as to deprive not only the person who commits the act of his rights but also to prevent his trustee in bankruptcy if adjudication follows from adopting the contract or disclaiming it under the provisions of the Bankruptcy Act, 1914? The answer to this question given by the court was "no," but at least one text-book of authority in this branch of the law suggests a contrary conclusion, and the present case is, therefore, of some importance if only because it clears up a doubt that has produced divergent opinions among writers of eminence on the law of the sale of land.

The text-book in question is Williams on Vendor and Purchaser, which contains the following passage (4th ed., pp. 584–585): "If the vendor has notice of an act of bankruptcy committed by the purchaser, he cannot safely proceed with the contract so long as the act of bankruptcy remains available; for any money subsequently paid to him by the purchaser might be recovered back by the trustee under a subsequent adjudication of bankruptcy against the purchaser. For this reason a purchaser who has committed an act of bankruptcy which remains available against him cannot enforce the specific performance of the contract by the vendor. And it appears that, if time is of the essence of the contract, and on the day fixed for completion the purchaser's act of bankruptcy still remains available against him, the vendor will be entitled to treat the contract as broken and to claim the deposit as forfeited. And, if time is not of the essence of the contract, it seems that the vendor receiving notice of an act of bankruptcy by the purchaser may at once take the objection that the purchaser is not and will not at the time fixed for completion be capable of making a valid payment of the purchase-money, and may repudiate the contract on this ground."

In the present case the contract was dated the 29th August, and it fixed the 30th November following as the day for completion. On the 21st November the purchaser announced to his creditors that he was unable to meet his liabilities, and a meeting of the creditors was called for the 29th November. There was no dispute that this announcement constituted an act of bankruptcy, and in due course a receiving order was made against the purchaser and he was adjudicated bankrupt, but in the meantime, the contract not having been completed on the day fixed for completion, the vendor's solicitors, by a letter dated the 3rd December to the bankrupt, purported to repudiate the contract and to forfeit the deposit which had been paid on the ground that the bankrupt, on the day fixed for completion, was incapable of making a valid payment of the purchase-money in view of his act of bankruptcy, and that it was evident that he would not be capable of completing the contract within any reasonable time, if at all. This action was, doubtless, based on the passage from Williams set out above, and the vendor's argument was that where (as in the present case) the date for the completion of a contract is fixed within the period of three months after an available act of bankruptcy by the purchaser, within which period the vendor cannot safely proceed with the contract, he is not bound to wait until that period expires, but is entitled to treat the notice of the act of bankruptcy as a repudiation of the contract. That by itself, being a unilateral act, would not put an end to the contract, but the vendor (on this argument) can accept this repudiation, and on his acceptance, if that occurs before adjudication, the contract is rescinded.

This argument would have been valid if time had been made of the essence of the contract (*Powell* v. *Marshall, Parkes & Co.* [1899] 1 Q.B. 710: a case in which the act of bankruptcy was committed by the vendor, and not as in the present case by the purchaser, but the principle is the same whichever party claims rescission). On that footing the bankrupt would not have been in a position to complete the contract on the day fixed for completion, since any money paid by him to the vendor at that time might have been recovered from the latter by the former's trustee in bankruptcy on a subsequent adjudication, and, the time for (amongst other things) payment of the balance of the purchase price being fixed without possibility of extension for the purchaser, an immediate breach of the contract by the purchaser would result. This breach the vendor would then have been able to treat as a repudiation. As, however, time had not been made of the essence of the contract in the present case, the vendor's repudiation was held to be ineffectual. The present action was an action by the trustee in the purchaser's bankruptcy for damages for breach of contract, the vendor having resold the property at a profit after his purported repudiation of the contract (it was conceded that

the plaintiff would not have been entitled to specific performance, even if the property had still been in the vendor's hands), and the result of the action was, therefore, a declaration that the plaintiff was entitled to damages as claimed.

Another argument put forward on behalf of the vendor was based on cl. 25 of the National Conditions of Sale (which were incorporated in the contract in this case), whereby if a purchaser neglects or fails to complete his purchase in accordance with the contract his deposit is forfeited (unless the court otherwise directs), and the vendor in effect becomes at liberty to resell the property at his discretion. It will be recalled that, in the now famous case of *Smith* v. *Hamilton* [1951] Ch. 174, it was held that where time is not made of the essence of the contract a purchaser does not fail to complete in accordance with the contract merely because he fails to complete on the day fixed for completion: there is no such failure until a reasonable time after the day fixed for completion has elapsed. Applying his own decision in the earlier case, Harman, J., held that the vendor in the present case was not entitled, as a result of the act of bankruptcy on the part of the purchaser, to forfeit the deposit and resell the property in reliance on cl. 25 of the National Conditions, nor did that act entitle him to serve a short notice to complete, which, if disregarded, would have had the effect, on its expiration, of bringing the vendor into a position to rely on cl. 25. This part of the decision is very short, and it may perhaps require elucidation in the future, for this reason: in *Smith* v. *Hamilton* the vendor was held to be entitled to rely on cl. 25 only on the expiration of a reasonable time after the date fixed for completion (the purchaser not having then completed), and by way of explanation of this expression the learned judge gave it as his view that a reasonable period for this purpose could not be said to have expired until the purchaser had, by his action or inaction, deprived himself of the equitable remedy of specific performance. If such deprivation is essential to the accrual of a vendor's rights under cl. 25, the relation between *Smith* v. *Hamilton* (where the purchaser certainly possessed such rights) and the present case (where his act of bankruptcy had deprived him thereof before they had arisen) is not quite clear.

But what is quite clear is that the present case, as also *Smith* v. *Hamilton*, is a powerful inducement to vendors to make the day fixed for completion of the essence of the contract from the outset. If a realistic date is fixed, no considerable hardship can fall on the purchaser by being put in this respect in the same position as any party to any ordinary commercial contract. From the vendor's point of view the advantages of having a date for completion that is really, and not merely formally, fixed are, of course, overwhelming, and I should not be surprised to see many more contracts in the future making time of the essence, so far, at any rate, as completion is concerned.

"A B C"

Landlord and Tenant Notebook

RIDICULUS MUS?

THE new legal year has not yet produced any reported landlord and tenant litigation, or any legislation affecting that branch of the law worth noting. Turning to the lay Press for inspiration, I have come across an item of news reported in an evening paper on 3rd October, headed "£3,570 Suit over a Mouse," which, while the scene is laid in Indiana, U.S.A., may serve as an occasion for considering some of the responsibilities of English landlords, very much in the news here at the moment.

The claim arose in this way: The plaintiffs, a married couple, occupied a flat, which must have been let together with furniture; the news item does not say who was tenant or whether both were tenants. A mouse frightened the female plaintiff who backed away and came into contact with a table. The table collapsed: she fell, breaking her ankle in three places. And the action is being brought against the landlord of the flat for negligence (*a*) in failing to give warning of the unsafe condition of the table, and (*b*) in letting the mouse into the flat.

Apart from such matters as the amount claimed and the question of remoteness, what will strike a reader of this paper first is the unexpectedness in the cause of action relied upon. Whether the flat be let to the husband, the wife or to both, in English law the defendant would have an answer to the claim as regards the presence of the mouse (if he did not get it struck out): simply, that he was not the occupier of the flat or in possession of the table. In *Norman* v. *Great Western Railway Co.* [1915] 1 K.B. 584 (C.A.), Buckley, L.J., gave us a short statement of the "ascending scale" of liability of a person upon whose land another person comes, according to whether the other person was a trespasser, a licensee or an invitee; a tenant was not and could not be included, because for the purposes of the statement he would not be a person coming upon another person's land. Even if the husband is the tenant *and* the landlord contractually liable to him for the safety of premises and furniture, there could be little hope of the wife's claim for pain and suffering succeeding; numerous attempts have been made to obtain recognition of such a duty. But it is just possible that an interesting argument might be based on *Donoghue* v. *Stevenson* [1932] A.C. 562 as regards the table, a bailed chattel. *Otto* v. *Bolton* [1936] 2 K.B. 46, however, shows that the doctrine of *Donoghue* v. *Stevenson* is inapplicable to damage sustained by defects in realty; a county court decision recorded in "Current Law" for January of this year (No. 147) is, it is true, apparently based on a different view.

The possibility of an allegation that the mouse had come into the flat from a part of the building retained by the defendant landlord should not be overlooked, but if that were the essential fact relied on one would expect, in England, the cause of action to be derogation from grant. Damage done to and on demised premises by water overflowing from a leak in a cistern outside the premises, and brought about by a rat which had gnawed a hole therein, has been held not to be actionable (*Carstairs* v. *Taylor* (1871), 40 L.J. Ex. 129); but a court could, no doubt, be invited to distinguish a case in which the rodent actually crossed the boundary.

If, however, he did put forward claims in tort, no reader of this paper would omit to allege breach of contractual obligation, express or implied, and thus be sure of a cause of action for some of the harm done (for in *Carstairs* v. *Taylor*, *supra*, the husband tenant was awarded damages in respect of medical expenses for which he was liable as husband). But assuming that implied obligation had to be relied upon, the next step would be to find authority showing that such matters fell within the scope of the warranty and condition as to fitness.

The position would not be hopeful. Most of our authorities do, it is true, deal with cases in which the presence of animal

life was complained of; but the creatures concerned, if smaller, were more numerous than the solitary animal which operated in the Indiana flat. Even if some sort of an analogy could be embarked upon, however, it would break down when the attention of the court was drawn to authorities, no fewer than three of them, the most recent being *Sarson* v. *Roberts* [1895] 2 Q.B. 395 (C.A.), laying down that the implied obligation, in the case of furnished tenancies, relates only to the condition of the premises at the commencement of the tenancy, there being no warranty that they shall continue to be fit. For the allegation, as at present reported, does not suggest that the mouse had been in the flat when the letting began. This would mean that the plaintiff would, this time figuratively, fall back on the table; but one imagines that it would be hard to convince a court that a table which collapsed in such circumstances was not fit or made the premises not fit for occupation.

The warranty of fitness implied by common law contrasts with that imported into low rental letting agreements by the Housing Act, 1936, s. 2, which obligation continues to operate throughout the tenancy. It is, of course, extremely unlikely that a furnished letting would be at a figure within the statutory limits (£40 a year in, £26 a year outside, London). If it were, the authorities certainly show a wider range of examples of unfitness; but as regards the entry of a mouse, the nearest appears to be *Stanton* v. *Southwick*' [1920] 2 K.B. 642, in which the tenant, whose premises actually comprised a shop as well as a dwelling-house within the rental limits (which were the same under the Housing, etc., Act, 1909) claimed damages from his landlord for damage done by rats to provisions in the shop and to clothing in the residential part of the premises. The county court judge, who decided in the plaintiff's favour, found that the rats (the sewer variety) came from outside, that the defendant's agent knew that the house was overrun by them when arranging the tenancy, and that the case was not one of an isolated invasion. Facts analogous to the first two so found, but not to the third, may be present in the Indiana case. But, even so, the Divisional Court reversed the judgment, holding that there was no duty on the defendant to guard against foreign invasion; though Salter, J., expressed the view that the position would be different in a case in which rats bred in the house. The decision might, of course, be distinguished if the mouse in the American case were found to be one of a colony breeding in part of the premises retained by the defendant, and *Carstairs* v. *Taylor*, *supra*, held not to have any persuasive effect in Indiana. And I may add that the claim in *Stanton* v. *Southwick* was a very modest one (£33 11s. had been awarded) compared with that noted in the evening paper because the trouble had effectively been dealt with by the local authority, whose functions include both housing and mousing.

R. B.

HERE AND THERE

"HANGING JUDGE"

"THERE'S no wisdom below the girdle," a distinguished Chief Justice of the seventeenth century is said to have remarked when he married his cook. It is just as true in the twentieth century and still no less true of distinguished lawyers than of other members of the human family. Indeed, at one period between the wars it was an open secret that one of His Majesty's judges maintained in Norfolk just such a retreat as solaced the vacations of Mr. Justice Brittain, in Raymond Massey's "Hanging Judge," at the New Theatre. Even at this distance of time it would be indelicate to be more explicit but one cannot help wondering whether Bruce Hamilton, who wrote the novel of which the play is a dramatisation, knowingly wove the real-life situation into his fiction. However, so far as character goes, as distinct from setting, his central figure has a good deal more in common with a very different judge of the same period, the late Sir Horace Avory, a virtuoso of criminal law, a "law machine," a lawyer whose mind was a stone tabernacle in which was enshrined a hard indestructible faith in the perfection or near-perfection of the English law as an instrument of achieving right conclusions. On the Bench, and therefore in his element, Avory was the very image of Rhadamanthine justice. Out of his robes, however (may I quote a well-circulated description of him?), he "went through life looking like a disgruntled horse coper." Now, with great respect to Sir Godfrey Tearle, who plays the judge, anything like that would have been completely beyond his range and, in fact, in his hands Sir Francis Brittain assumes much of the bearing and manner of an exceedingly eminent lawyer-statesman happily still with us. The composite picture all adds to the interest of the piece.

HIS OWN MEDICINE

REGULAR followers of dramatic criticism will know the plot by this time. For those who don't, here it is in brief. One day during the Long Vacation the judge is in his club when an outstandingly nasty young man asks for him, pushes his way in, hard on the heels of the servant, and announces his name with sinister emphasis as "Teal." Now, he is in fact the ghost of an indiscretion thirty years past, a son whom the judge has never either seen or communicated with. Thrown off his balance by the name, the judge unwisely, but perhaps understandably, gives him an appointment elsewhere. Rather less understandably he shifts the venue to his secret rural retreat where, under an assumed name, he has hitherto given his young housekeeper-mistress to understand that he is a schoolmaster from the Midlands. The young man, who combines a mind diseased with a concentrated hatred of his male parent, keeps the appointment and neatly kills himself by poison on the hearthrug in circumstances so contrived that they very plausibly suggest murder. The judge panics, pushes the body down a well, tells the police a false story when they find it and question him and finally returns to town, apparently in the rather naïve belief that by shedding his fictitious personality and resuming his own he has effectively eluded discovery. Of course, Scotland Yard is on his trail in no time. Of course, strings are pulled in high places to stifle inquiry. But unfortunately the judge has a mortal enemy, a big business man Member of Parliament, who as fast as the strings are pulled deftly cuts them. Consequently, in the last act poor Brittain finds himself testing in his own person the foundation of his faith in the infallibility of English criminal procedure, an experiment not rendered any the more satisfactory by his having told a fabricated story to his legal advisers.

PANIC AND PROBABILITIES

Now, we all know that every now and then profound lawyers make the most outstanding mess of their own testamentary dispositions and that as often as not they don't make particularly good witnesses, and I can well imagine that the judge in the play, who, in his judicial capacity, had never been able to believe in the vagaries of the panic-stricken, might well see things in a strange new light when he encountered panic in his own person. What I, for one, however, do find a little hard to swallow is that, after years of experience as a King's Bench judge and, apparently, a criminal law specialist at that, the man's panic would have taken the outstandingly unsophisticated form represented. Still, human nature is infinitely varied and unpredictable

and maybe I'm wrong. Anyhow, once you've taken the big gulp and got that down there remains an extremely powerful melodrama, not, indeed, a great play but one well worth the seeing. What is particularly remarkable is that, in a piece all about lawyers, no technical inaccuracies leap to the attention. If there are any the action hurried them past me unobserved. Lawyers who love "shop" might find it an amusing game to see whether they have a more acute perception. In the cast there's a K.C., M.P., a junior counsel and a solicitor and there's no difficulty in believing in any of them. The play neatly side-steps the pitfalls of a trial scene by alternating between the cells and the jury-room. Altogether a good thrilling evening of it for lawyers and others, with enough technical interest to get the lawyers arguing where (if anywhere) the unusual ends and the impossible begins.

RICHARD ROE.

BOOKS RECEIVED

Excess Profits Levy Law and Practice. By ROY BORNEMAN, Q.C., of Gray's Inn, and PERCY F. HUGHES, A.S.A.A., F.C.I.S., Assistant Editor of *Taxation*. 1952. pp. xix and (with Index) 344. London: Taxation Publishing Co., Ltd. 21s. net.

Company Control. By T. G. ROSE, F.I.I.A., M.I.Mech.E., M.I.P.E. With a foreword by Sir CHARLES RENOLD, J.P., F.I.I.A. 1952. pp. 40. London: Gee & Co. (Publishers), Ltd. 10s. 6d. net.

The Valuation of Goodwill. Written and published by The Incorporated Accountants' Research Committee. 1952. pp. 39. 2s. 6d. net.

The Appointment and Remuneration of Auditors under the Companies Act, 1948. Written and published by The Incorporated Accountants' Research Committee. 1952. pp. 19. 2s. net.

Private International Law. Fourth Edition. By G. C. CHESHIRE, D.C.L., F.B.A. 1952. pp. l and (with Index) 687. Oxford: Clarendon Press. £2 10s. net.

The Elements of Conveyancing. Eighth Edition. By JOHN F. R. BURNETT, of Gray's Inn, Barrister-at-Law. 1952. pp. xxxi and (with Index) 508. London: Sweet & Maxwell, Ltd. £2 7s. 6d. net.

Modern Equity. Sixth Edition. By HAROLD GREVILLE HANBURY, D.C.L., Vinerian Professor of English Law in the University of Oxford. 1952. pp. xl and (with Index) 774. London: Stevens & Sons, Ltd. £3 3s. net.

The Lands Tribunal Procedure and Practice. By SPENCER C. RODGERS, of Lincoln's Inn and the Midland Circuit, Barrister-at-Law. 1952. pp. xxxi and (with Index) 326. London: The Estates Gazette, Ltd. 27s. 6d. net.

REVIEWS

Income Tax Law and Practice. Twenty-fourth Edition. By CECIL A. NEWPORT, F.A.C.C.A., Fellow of the Institute of Taxation, and OLIVER J. SHAW, of Gray's Inn, Barrister-at-Law. 1952. London: Sweet & Maxwell, Ltd. 27s. 6d. net.

The popularity of this book can be judged from the fact that a fresh edition appears each year. The passing of the consolidating Income Tax Act, 1952, has not caused any substantial rearrangement of the text, but references to the new Act appear throughout. The book is written with admirable clarity, and assumes no prior knowledge of the subject. At the same time, it is one which the practitioner will find most valuable for constant reference. Many examples serve to illustrate the text.

Like any other work on this complex subject, this book carries with it the vices of its virtues. Simplification such as the authors have attained inevitably involves disregarding the finer points of law and practice and the various degrees of qualification attaching to bold propositions. For this reason, when cases of an unusual kind arise, the user of this book will have to travel beyond its covers to the sources of the law, in the form of the statutes themselves and the decided cases, or to a standard work. Provided that this is realised the practitioner can safely rely on Newport and Shaw for guidance on the day-to-day problems which come before him. This criticism of the book is not to be regarded as adverse, for the authors have wisely kept their attention directed to the person whose needs the book is primarily intended to meet, the accountancy student, and have not allowed themselves to be diverted to the production of a hybrid satisfactory to no one, which might have occurred had they tried to meet the practitioner on his more difficult ground, while casting their eyes over their shoulders at the student plodding up behind.

The Death Duties. Second (Cumulative) Supplement to the Eleventh Edition. By ROBERT DYMOND and REGINALD K. JOHNS. 1952. pp. xv and 91. London: The Solicitors' Law Stationery Society, Ltd. 8s. 6d. net.

"Dymond" is well known to the practitioner as an invaluable and lucid exposition of death duty law and practice. This supplement maintains the standard of its parent and brings the law down to the end of Trinity Term. It is alarming that two years' changes in the law should be such as to require ninety pages of commentary, but this only emphasises the necessity of keeping one's self and one's books up to date when dealing with this difficult matter.

The uncertainties surrounding *A.-G.* v. *Oldham* [1940] 2 K.B. 485 can be made a fruitful field and one observes with interest but without enthusiasm the forecast, at p. 16, that they are likely to be explored in the courts. When this sort of muddy water is stirred the ultimate result is often more beneficial to the Crown than to the taxpayer.

Stone's Justices' Manual for 1952. Eighty-fourth Edition. Edited by JAMES WHITESIDE, Solicitor, Clerk to the Justices for the City and County of the City of Exeter, and J. P. WILSON, Solicitor, Clerk to the Justices for the County Borough of Sunderland. 1952. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. Two volumes: thin, £4 2s. 6d. net; thick, £3 17s. 6d. net.

The 1952 edition of Stone, the first ever to be produced by joint editors, contains all the 1951 statute law and cases up to October, 1951, where applicable. The Justices of the Peace (Size and Chairmanship of Bench) Rules, 1950, as amended, and the Magistrates' Courts Committees (Constitution) Regulations, 1951, are set out in full. The material collected at the end of the main work has been revised and rearranged into seven appendices, which include their own table of contents where appropriate: Forms, Cautions, Punishments, Rules, Court Fees and Costs Regulations, General Regulations, and Miscellaneous Legislation. The work of re-setting the type has been completed almost to the end of the first volume.

Compensation for the Compulsory Acquisition of Land. By A. W. NICHOLLS, M.A., B.Litt. (Oxon.), of Gray's Inn, Barrister-at-Law. 1952. Hadleigh: The Thames Bank Publishing Co., Ltd. £3 5s. net.

The object of this book is to annotate the numerous statutory provisions relating to the assessment of compensation for land compulsorily acquired. Although there is no indication in the title, it deals also with the cognate subjects of compensation for depreciation of land values and assessment of development charges under the Town and Country Planning Act, 1947. It does not intend to deal with powers of compulsory acquisition, but the book may be useful to valuers

who wish to have a brief guide to the law relating to compulsory acquisition as well as a detailed statement of the rules as to compensation.

The book may perform a useful purpose in gathering together the confused statutory provisions and in making them reasonably intelligible. In some respects, however, it is not altogether satisfactory. Although published on 8th October, 1952, there is no date on the preface and there appears to have been some delay since the text was prepared. For instance, the reference to the well-known case of *Earl Fitzwilliam's Wentworth Estate Co.* v. *Ministry of Housing and Local Government* mentions only the decision of the Court of Appeal and that leave had been given to appeal to the House of Lords. There are also a few rather serious errors of omission. The appendix of statutory instruments includes the Town and Country Planning (Development Charge Exemptions) Regulations, 1948, and not the Regulations of the same name of 1950 which revoked and replaced the 1948 Regulations. Similarly, there is a reference at p. 191 to the Town and Country Planning (Use Classes) Order, 1948; although it is stated that this may be amended or revoked at any time there is no mention of the order of 1950 replacing it.

In general the explanatory matter is well written and enables one to find one's way through the tangle of statutory provisions as easily as is possible. The discussion at p. 208, however, of the effect of earlier planning legislation on the calculation of unrestricted values of land is somewhat difficult to follow and is not assisted by a reference to "interim development schemes" which are stated to have been enforceable since the Town and Country Planning (Interim Development) Act, 1943, came into operation. As the book is intended to deal comprehensively with the assessment of development charges it is suggested that it should have contained a copy of, or extracts from, the Practice Notes of the Central Land Board. Although these have no binding effect they are of very great importance in practice in assisting in the solution of some of the problems left open by the wording of the 1947 Act and statutory instruments.

The conclusion is that this book is useful but contains some major flaws and is rather high in price. Nevertheless, it may well be of considerable assistance to valuers, surveyors and similar persons who wish to have accurate detailed information about legislation governing compensation for compulsory acquisition and for depreciation of land values and legislation relating to assessment of development charges. Most solicitors who wish to study these matters have the information available elsewhere, although probably not in a form so convenient for quick reference.

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Angus Fire Area Administration Amendment Scheme Order, 1952. (S.I. 1952 No. 1786 (S.96).)

Argyll County Council (Kilmore) Water Order, 1952. (S.I. 1952 No. 1785 (S.95).) 5d.

Argyll County Council (Portnacroish) Water Order, 1952. (S.I. 1952 No. 1784 (S.94).) 5d.

Biscuits (Prices) (Revocation) Order, 1952. (S.I. 1952 No. 1774.)

Bread Order, 1952. (S.I. 1952 No. 1781.) 6d.

Carmarthen Corporation Water Order, 1952. (S.I. 1952 No. 1780.)

Electric Lighting (Restriction) (Revocation) Order, 1952. (S.I. 1952 No. 1772.)

Exchange Control (Authorised Dealers) (No. 3) Order, 1952. (S.I. 1952 No. 1770.) 5d.

Exchange Control (Authorised Depositaries) (No. 3) Order, 1952. (S.I. 1952 No. 1769.) 5d.

Exchange of Securities (No. 3) Rules, 1952. (S.I. 1952 No. 1771.) 5d.

Export of Goods (Control) (Amendment No. 3) Order, 1952. (S.I. 1952 No. 1759.)

Fats and Cheese (Rationing) Order, 1952. (S.I. 1952 No. 1778.) 6d.

Glamorgan River Board (Fisheries) Order, 1952. (S.I. 1952 No. 1775.)

Income Tax (Employments) (No. 4) Regulations, 1952. (S.I. 1952 No. 1758.) 5d.

Lace and Net (Manufacture and Supply) (Revocation) Order, 1952. (S.I. 1952 No. 1788.)

Llandilo-Carmarthen Trunk Road (Abergwili Bridge) Order, 1952. (S.I. 1952 No. 1753.)

London-Edinburgh-Thurso Trunk Road (Midgarty Diversion) Order, 1952. (S.I. 1952 No. 1755.)

London-Edinburgh-Thurso Trunk Road (Wallyford Tunnel) Order, 1952. (S.I. 1952 No. 1754.)

Oils and Fats (Amendment) Order, 1952. (S.I. 1952 No. 1773.)

Perth and Kinross Fire Area Administration Amendment Scheme Order, 1952. (S.I. 1952 No. 1783 (S.93).) 5d.

Purchase Tax (No. 5) Order, 1952. (S.I. 1952 No.1750.) 6d.

Seed Potatoes Order, 1952. (S.I. 1952 No. 1782.) 8d.

Ships' Stores (Amendment) Order, 1952. (S.I. 1952 No. 1776.)

Stopping up of Highways (Cornwall) (No. 3) Order, 1952. (S.I. 1952 No. 1761.)

Tea (Licensing and Prices) (Revocation) Order, 1952. (S.I. 1952 No. 1777.)

Trading with the Enemy (Enemy Territory Cessation) (Germany) Order, 1952. (S.I. 1952 No. 1760.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102-103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

OBITUARY

MR. N. T. AMBROSE

Mr. Neil Trevor Ambrose, solicitor, of Peterborough, died on 6th October, aged 35. He was admitted in 1942.

MR. T. P. ELDRIDGE

Mr. Theodore Paul Eldridge, solicitor, of Leicester, died on 3rd October, aged 70. He was admitted in 1904.

MR. H. W. FAULKNER

Mr. Henry Warry Faulkner, Frome's oldest practising solicitor, died on 1st October, aged 70. Admitted in 1904, he had many local interests and was solicitor to Frome Urban Council.

MR. L. GOCHER

Mr. Leonard Gocher, solicitor, of Edgbaston, died on 4th October, at the age of 85. He was admitted in 1891.

MR. E. M. HARLEY

Mr. Edward Mortimer Harley, solicitor and company director, of Bristol, has died at the age of 77. Admitted in 1899, he held many important posts in Bristol, among which were those of vice-president of the Bristol Hospitals Fund and of the Western Provident Association for Hospital and Nursing Home Services, honorary secretary of the Lord Mayor's Hospital Sunday Fund and chairman of the Clifton Suspension Bridge Company.

MR. F. J. K. HULL

Mr. Francis John Kingdon Hull, retired solicitor, formerly of Little College Street, Westminster, died on 1st October. He was admitted in 1898.

MR. C. RAE

Mr. Charles Rae, retired solicitor, formerly of Liverpool, died at Rhoscolyn, Anglesey, aged 69.

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 102-103 Fetter Lane, E.C.4, and contain the name and address of the subscriber, and a stamped addressed envelope.

Sale by Mortgagee—CONTRACTS FOR SALE ENTERED INTO BY MORTGAGOR—OVERREACHING EFFECT OF MORTGAGEE'S CONVEYANCE

Q. AW is purchasing a cottage from a bank which is selling under its power as mortgagee, the property having been charged to the bank by way of legal mortgage in October, 1949. The charge is in the form usual for the bank. On 24th May, 1951, an estate contract was registered by X against the mortgagor, the estate contract purporting to have been created by an instrument dated in January, 1950, made between the mortgagor and X. The vendor's solicitors have a copy of a later agreement (not registered) between the mortgagor and X, dated 28th May, 1951, whereby amongst other matters the mortgagor agrees to sell the property to X for the sum of £400 or, if the purchase is completed before 29th September, 1951, for the sum of £450. Is the purchaser in any way interested, either in the estate contract, which has been registered, or in the agreement dated 28th May, 1951, which has not been registered, in view of the fact that both these agreements were made after the date of the mortgage? Does the date on which the power of sale became exercisable under the mortgage in any way affect the position?

A. Under s. 2 (1) (iii) of the Law of Property Act, 1925, a conveyance by a mortgagee to a purchaser of a legal estate in land overreaches any equitable interest or power affecting such estate, if capable of being overreached by such conveyance and whether or not the purchaser has notice of such equitable interest or power. Under s. 104 (1) of the same Act, a mortgagee exercising the power of sale conferred by the Act has power to convey the estate or interest which he is thereby authorised to sell or convey, or which is the subject of the mortgage, free from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage. What these are where the mortgagee has a charge by way of legal mortgage will be found in s. 88 of the Act as regards mortgages of freeholds, and in s. 89 as regards mortgages of leaseholds; they are confined to prior legal mortgages. As both estate contracts are subsequent to the bank's mortgage they cannot have priority over it even in the very unlikely event that they create legal estates. Accordingly the purchaser is not concerned with either of them, and the date when the power of sale became exercisable is irrelevant.

Title—APPROPRIATION BY WIDOW IN OWN FAVOUR AFTER INTESTACY—WHETHER DISPARITY OF VALUE IS NOTICE OF INCONSISTENCY OF ASSENT PUTTING PURCHASER UPON ENQUIRY

Q. We act for the purchaser of freehold property from a vendor who acquired it under an intestacy. The intestate died in 1944, when the estate was proved at £579. The widow of the intestate, the present vendor, executed an assent in her own favour dated 10th November, 1944, presumably because, the estate being under £1,000, she was entitled to the whole of it. The present purchase price is £1,850. The vendor's solicitors maintain that we must accept the assent without further enquiry, but we consider that the disparity between the present purchase price and the value in 1944 is so great as to put the purchaser on enquiry as to the circumstances behind the assent. The case seems to turn on the interpretation of the decision in *Re Duce and Boots' Contract.*

A. The principle of *Re Duce and Boots Cash Chemists (Southern), Ltd.'s Contract* [1937] Ch. 642 appears to be that the "sufficient" evidence which is provided by an assent and a grant of representation upon which there is no note of any previous assent or conveyance is not "conclusive" in favour of a purchaser for money or money's worth who, if he has notice of any matter which casts doubt upon the correctness of the assent, may refuse to accept the title until such correctness is shown by evidence apart from the assent itself. If in the case of an intestacy an appropriation is made at a particular value clearly below the true market value and different persons would have been entitled had the appropriation been made at full market value, this would, in our opinion, be notice of a matter casting doubt upon the correctness of the assent and one which the purchaser is entitled to have satisfactorily explained before being compelled to accept the title. In our view a distinction may have to be drawn between an assent in favour of a person entitled on an intestacy and one entitled under a will. In the former case the devolution under the intestacy is a matter of statute and therefore public knowledge, and as such part of the title, whereas in the case of a will this is not, since 1925, a document of title, and a purchaser who takes his conveyance in ignorance of its contents cannot be regarded as having notice of any inconsistency there may be between the will and the assent. We therefore consider that the purchaser's solicitors are entitled to have any under-valuation in respect of the assent satisfactorily explained.

Hospital Management Committee—MONEYS RECEIVED UNDER NATIONAL HEALTH SERVICE ACT, 1946—POWERS OF INVESTMENT

Q. We are acting for a hospital management committee who have received a certain sum of money under s. 60 (1) of the National Health Service Act, 1946. They cannot expend the capital of the money forthwith, and in fact desire to retain the money and to apply the income for the purposes for which they received the money so as to preserve the capital indefinitely for these purposes. We cannot find in the Act anywhere any statement of the powers of investment of a hospital management committee either in respect of moneys received in this way or other moneys. Is it considered that committees' powers of investment, if any, are limited to investment in trustee investment?

A. We are not aware that investments have been prescribed for the funds of hospital management committees received by them under s. 60 of the National Health Service Act, 1946. The circumstances in which such investment is called for would, in our opinion, be unusual since "investment" in trustee securities or otherwise does not seem to us to be an "application" by the committee of sums paid to them "for the purposes specified in the trust instrument," which application is directed to be made by the committee "so far as practicable" (s. 60 (2)). If, however, investment is considered expedient we consider that the committee can either be regarded as performing the duties of the trustees under the original trust, in which case they would clearly be confined to trustee securities, or as making an application of the money for the purposes of the trust instrument. As such purposes would not include investment outside the range of trustee securities, investment should, we think, be confined within that range "so far as practicable." The committee would, in any case, appear to have power to invest in any securities permitted by the trust instrument even if not authorised by law.

Right of Support—EFFECT OF VERBAL PERMISSION TO ERECT LEAN-TO SHED

Q. A and B were occupiers of adjoining houses. The wall dividing the properties belonged to B. Some three or four years ago A asked B (who has recently died) whether he, A, could use B's wall to support a garden shed which he, A, proposed to build. B gave his consent and the shed was duly built. B's widow, who admits that her husband gave his consent to the above operation, has now asked A (for whom we act) for an acknowledgment in respect of the right of support against B's wall. A is not now willing to give such an acknowledgment. Presumably A cannot be forced to sign an acknowledgment in respect of this right, but can he be made to pull down the shed or that portion which rests on B's wall? It seems to us that when B gave his consent for the erection of the shed, our client, A, altered his position for the worse and consent once given cannot be revoked.

A. There seems to us to be considerable difficulty in the way of A maintaining his refusal to give the requested acknowledgment. Owing to the informality of the original consent it is not easy to say whether it was intended as an easement to run with A's land (as appears most probable) or a licence personal to A. If it was intended as an easement it would not appear to have been effectively granted by reason of the absence of a deed under seal (Law of Property Act, 1925, s. 51 (1)) or a contract to grant the easement made for valuable consideration. The permission given by B appears to have been a bare promise for which A gave no consideration. The erection of the shed,

by which A has acted to his detriment, was not the consideration for B's permission, for A did not bind himself to erect the shed, and although the erection of the shed would be an evidential act of part performance, this doctrine only applies where there is an actual but otherwise unenforceable contract. The cases such as *Winter* v. *Brockwell* (1807), 8 East 308; *Luggins* v. *Inge* (1831), 7 Bing. 682; *Plummer* v. *Mayor of Wellington* (1884), 9 App. Cas. 619; and *Canadian Pacific Railway Co.* v. *R.* [1931] A.C. 414, where a licence to do acts on the land of the licensee involving expenditure by the latter has been held to be irrevocable, appear all to have involved a licence given for value. (See also *Perry* v. *Fitzhowe* (1846), 8 Q.B. 757.) In our opinion, A can be compelled to pull down the shed, or at least remove it from the wall, and should therefore give the acknowledgment asked for by the present owner of the servient tenement.

Party Wall—Half Destroyed by Enemy Action—Damp entering through Exposed Face—Liability of Owner of Demolished Half

Q. A owns the site of a house destroyed by enemy action. The house, which no longer exists, was semi-detached. The party wall now forms the external wall of the adjoining premises, and was partially cement-rendered by the local authority after the war damage. Damp is now said to be penetrating through the party wall and the adjoining owner claims that A must prevent damp coming through from the exposed face of his side of the party wall. Does the adjoining owner's right of support and user extend to require any positive act on A's part to repair his side of the party wall and, if so, is such repair limited to what may be necessary to preserve the support?

A. Where semi-detached houses have been erected and necessarily require mutual support the law implies, as between the two houses, when they are conveyed separately, the grant and reservation of such easements as may be necessary to give effect to the common intention of the parties with regard to the user of the party wall, the nature of such easements varying with the circumstances of each case (Gale on Easements, 12th ed., p. 408). Subject to this, the owners of each moiety (see Law of Property Act, 1925, s. 38 (1) and Sched. I, Pt. V, para. 1) may deal with their own part of the wall as they think fit (*Jones* v. *Pritchard* [1908] 1 Ch. 630; *Upjohn* v. *Seymour Estates, Ltd.* (1938), 54 T.L.R. 465). Apart, however, from local custom or special contract the servient owner is not liable to repair his own half of the wall (*Sack* v. *Jones* [1925] 1 Ch. 235; *Macpherson* v. *L.P.T.B.* [1946] W.N. 102), although he must allow the adjoining owner whose half of the wall may fall or otherwise suffer by reason of such disrepair to repair if he so wishes (*Jones* v. *Pritchard, supra*). Thus A is not bound to repair his half of the wall, either to support the adjoining owner's wall or to prevent the entry of damp. He must, however, permit the adjoining owner to rebuild A's half of the wall or to take such other steps to protect the adjoining property as the adjoining owner may wish.

NOTES AND NEWS

Honours and Appointments

The Queen has approved that the honour of knighthood be conferred on Mr. William Arthian Davies, Q.C., upon his appointment as a judge of the High Court of Justice.

Mr. F. G. Laws has been appointed assistant solicitor and prosecuting solicitor in the Town Clerk's department at Blackpool.

Mr. L. P. Wallen, senior assistant solicitor to Warwickshire County Council, has been appointed deputy Clerk to Somerset County Council.

Personal Notes

Mr. R. G. Hemingway, solicitor, of Coventry, was married on 27th September to Miss Eileen Sutton, of Kenilworth.

Miscellaneous

A Special University Lecture in Law will be given at King's College, Strand, W.C.2, at 5.30 p.m., on Wednesday, 3rd December, by Dr. G. C. Cheshire, F.B.A., D.C.L., entitled "A New Equitable Interest in Land." Admission will be free, without ticket.

Development Plan for the County of Hereford

The above plan was on 9th October, 1952, submitted to the Minister of Housing and Local Government for approval. The plan relates to land situate within the County of Hereford. A certified copy of the plan as submitted for approval has been deposited at the following places:—

The Office of the Clerk of the Herefordshire County Council, Shirehall, Hereford.

The Town Clerk's Office, Town Hall, Hereford.

The Town Clerk's Office, Grange Court, Leominster.

The Office of the Clerk of the Bromyard Urban District Council, Bromyard.

The Office of the Clerk of the Kington Urban District Council, Kington.

The Office of the Clerk of the Ledbury Urban District Council, Ledbury.

The Office of the Clerk of the Ross-on-Wye Urban District Council, Council Chambers, Ross-on-Wye.

The Office of the Clerk of the Bromyard Rural District Council, Old Road, Bromyard.

The Office of the Clerk of the Dore and Bredwardine Rural District Council, Pontrilas.

The Office of the Hereford Rural District Council, 21 East Street, Hereford.

The Office of the Clerk of the Kington Rural District Council, Duke Street, Kington.

The Office of the Clerk of the Ledbury Rural District Council, Church Street, Ledbury.

The Office of the Clerk of the Leominster and Wigmore Rural District Council, Corn Square, Leominster.

The Office of the Clerk of the Ross and Whitchurch Rural District Council, Woodside, Ross-on-Wye.

The Office of the Clerk of the Weobley Rural District Council, Hereford Road, Weobley.

Copies of the plan may be inspected at the places mentioned above from 10 a.m. to 12.30 p.m. and 2 p.m. to 4.30 p.m. (Saturdays 10 a.m. to 12 noon). Any objection or representation with reference to the plan may be sent in writing to the Secretary, Ministry of Housing and Local Government, Whitehall, London, S.W.1, before 1st December, 1952, and should state the grounds on which it is made. Persons making objections or representations may register their names and addresses with the Herefordshire County Council and will then be entitled to receive notice of the eventual approval of the plan.

SOCIETIES

The Rt. Hon. Clement Davies, P.C., Q.C., M.P., will address the Association of Liberal Lawyers in the Niblett Hall, 3 (North) King's Bench Walk, the Temple, on Friday, 24th October, at 8.15 p.m., on "Liberalism and the Rule of Law." The meeting will be open to all members of the legal profession; members of the Association may also bring guests not of the profession.

The following motions will be debated by the Law Students' Debating Society during November:—

4th November.—"That this House approves the action of the U.S.S.R. in vetoing the admission of Japan to U.N.O."

11th November.—"That under English law a plaintiff is placed at an undue disadvantage."

18th November.—Joint debate with the Union Society of London: "That this House regrets the result of the American Presidential Election."

25th November.—"That this House deplores the series of decisions following the case of *Whittall* v. *Kirby* [1947] K.B. 194."

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Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).